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IN THE

Supreme Court of the United States

October Term, 1967.

No. 1265.

WILLIAM J. FROMBACH,

Petitioner,

v.

GILBERT ASSOCIATES, INC.

PETITIONER'S REPLY TO MEMORANDUM IN OPPOSITION.

ABRAHAM E. FREEDMAN,
MILTON M. BOROWSKY,
MARTIN J. VIGDERMAN,
FREEDMAN, BOROWSKY AND LORRY,
Lafayette Building,
Philadelphia, Pennsylvania 19106,
Counsel for Petitioner.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Respondent has filed a Memorandum in Opposition to Petition for Writ of Certiorari, raising a procedural and substantive issue which is wholly without basis in fact or law.

Respondent contends that since the Federal questions herein were first raised on Petition for Rehearing to the Supreme Court of Delaware, there is no basis for review. As set forth in the Petition for Certiorari, page 5, the questions were raised by Petitioner as soon as they came into the case. The application of the Delaware statutes in violation of the Constitution first occurred in the decision of the Delaware Supreme Court, whereupon they were

immediately called to the Court's attention by Petition for Rehearing. The trial court had applied the Delaware statutes in favor of Petitioner, without discrimination because of his citizenship, so that the Constitutional issue had not theretofore arisen.

Upon this point, respondent cites *Radio Station WOW, Inc. v. Johnson,* 326 U. S. 120, 128, 89 L. Ed. 2092, 2099-2100 (1945). But, there, the Petitioners had waited until after the Nebraska Supreme Court had filed its opinion to contend for the first time in a Motion for Rehearing, that the Court was without jurisdiction over the subject matter —a situation which had existed from the start. The Nebraska Court, upon rehearing, pointed out that such a jurisdictional claim was "contrary to the pleadings filed", as well. However, in the instant case, there was no Constitutional issue to raise until the Delaware Supreme Court had filed its opinion applying the Delaware statutes as it did, for the first time in this case. This Federal question was timely raised upon Petition for Rehearing "since it was raised at the first opportunity", as in *Brinkerhoff-Faris Trust and Sav. Co. v. Hill,* 281 U. S. 673, 677-78, 74 L. Ed. 1107, 1112 (1930).*

Respondent argues, also, that this Court has already decided the issue herein presented adversely to Petitioner in *Canadian Northern R. Co. v. Eggen,* 252 U. S. 553, 64 L. Ed. 713 (1920). In that case, this Court sustained the constitutionality of a state borrowing statute, which protected from a shorter foreign limitation period a foreign

* Respondent states that the Petition herein does not comply with this Court's Rule 23(1)(f), since it does not specifically set forth the stage in the proceedings below where the federal questions were raised. Respondent is incorrect. The Petition for Certiorari, on page 5, sets forth specifically that the Constitutional questions were raised in the Petition for Rehearing before the Delaware Supreme Court, and that the Supreme Court denied rehearing. Appendix F to the Petition (page 38) embodies the two sentence notification of denial of rehearing.

cause of action held by a citizen of the forum state. In other words, this Court held that a non-resident plaintiff who was not diligent in starting suit is not denied his Constitutional rights if his foreign cause of action is held to be subject to the foreign statute of limitation which is shorter than the limitation of the forum, while a resident plaintiff would *not* be barred by the shorter period. This is not the instant case, however. In the instant case, separate and apart from the Delaware Borrowing Statute, was a specific Saving Statute which gave a plaintiff, who has not slept on his rights, an additional year to start a second action where the first, timely, action was dismissed other than on the merits. In the instant case, the Delaware Court has denied to Petitioner who *had* started suit in time access to its Courts, by means of applying its Saving Statute discriminatorily. The limitation had already been satisfied by the first suit which had been dismissed, and, except for his non-residence, his cause would have been saved.

It is respectfully submitted that the discriminatory application of the combined Delaware Statutes violated the Constitution of the United States, and should be reviewed by this Court, and reversed and remanded.

ABRAHAM E. FREEDMAN,
MILTON M. BOROWSKY,
MARTIN J. VIGDERMAN,
FREEDMAN, BOROWSKY AND LORRY,
Counsel for Petitioner.